OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 06-06 June 15, 2006

To: All Division Heads, Regional Directors,
Officers-in-Charge, and Resident Officers

From: Ronald Meisburg, General Counsel

SUBJECT: Report on Case Developments
January through March 2006

Attached is a report on case developments in the Office of the General Counsel during the period January through March 2006.

/s/
R.M.

cc: NLRBU
Released to the Public

REPORT OF THE GENERAL COUNSEL

This report covers my first three months as General Counsel. I have selected cases of interest that were decided during the period from January through March 2006, as well as one previous case of substantial significance that was decided during the term of previous General Counsel Arthur Rosenfeld. This report discusses cases which were decided upon a request for advice from a Regional Director or on appeal from a Regional Director's dismissal of unfair labor practice charges. In addition, it summarizes cases in which the General Counsel sought and obtained Board authorization to institute injunction proceedings under Section 10(j) of the Act.

_____/s/_____
Ronald Meisburg
General Counsel

EMPLOYER INTERFERENCE WITH PROTECTED ACTIVITIES

Employer's Mistaken Belief that Employee Engaged in Picket Line Misconduct Does Not Shield Employer from Liability for Unlawful Discharge

We concluded that a case of mistaken identity that led to the discharge of an Employee violated Section 8(a)(1) of the Act. The striking Employee was discharged based on the Employer's belief that he had thrown an object that shattered the windshield of an Employer vehicle driven by a supervisor trying to cross a picket line at the Employer's property during an economic strike against the Employer. The Employee claimed he was away from the picket line at the time of the incident.

The supervisor stated that he saw an employee toss a piece of wood towards the truck he was driving and that it shattered the truck's windshield. The police were summoned. The supervisor identified the Employee to the police as the individual responsible for throwing the wood that shattered the windshield. The Employee, who had just returned to the picket line after having gone with a fellow picketer to purchase food at a nearby restaurant, denied that he was involved and noted to the police that he had just returned from his food run. The Employee was taken to the police station and charged with criminal mischief and destruction of property.

After his release from the police station, the Employee returned to the picket line where a fellow employee came to him and acknowledged that he was the one who had caused the damage to the Employer's truck.

Following an investigation, based on the police report and the supervisor's identification of the Employee, the Employer discharged the Employee for picket line misconduct. Thereafter, the fellow employee accompanied the Employee to the police station and provided a statement to the arresting officer admitting that it was he and not the Employee who caused the damage. The fellow employee further told the police that the Employee was not on the picket line at the time of the incident.

The Employee was acquitted of all charges following a trial at which the Employee and others testified that he

was not at the picket line at the time of the incident, the fellow employee admitted his involvement, and witnesses testified that the supervisor who identified the Employee was initially unsure of his identification.

When an employer discharges an employee for misconduct arising out of protected activity, under Burnup & Sims the employer has the burden of showing that it held an honest belief that the employee engaged in serious misconduct. NLRB v. Burnup & Sims, 379 U.S. 21, 23 (1964). Once the employer establishes that it had such an honest belief, the burden shifts to the General Counsel to affirmatively show that the misconduct did not in fact occur. White Electrical Construction Co., 345 NLRB No. 90, slip op. 1-2 (2005); Pepsi-Cola Company, 330 NLRB 474 (2000).

The Employer in our case discharged the Employee based on its honest belief that the Employee had caused the damage to the Employer's vehicle. However, in light of the testimony that formed the basis for the Employee's subsequent acquittal on related criminal charges, a preponderance of the evidence demonstrates that the Employee did not commit the alleged offense that led to his discharge. Thus, the Employer's honest but mistaken belief that the Employee was responsible for the damage to its truck did not privilege the Employer to discharge the Employee who was otherwise engaged in protected activities. Burnup & Sims, 379 U.S. at 23.

The Employee's acquittal of the criminal charges is not conclusive of the matter given the different burdens of proof involved in criminal matters (Detroit Newspaper Agency, 342 NLRB No. 24, n.38 (2004)), but the facts that led to the acquittal may be material in determining whether the Employee was engaged in misconduct. K-D Lamp Division, 228 NLRB 1484, 1492 (1977). We determined that we would be able to show by a preponderance of the evidence that the Employee did not commit the misconduct for which he was accused. Aside from the Employee's own assertions of innocence, the fellow employee admitted his role in the incident. The fellow employee was deemed credible because he made himself vulnerable to discharge by acknowledging his role. Moreover, at trial, a witness corroborated the Employee's statement that he was not on the picket line at the time of the incident and potential Employer witnesses conceded that the supervisor was initially uncertain of his identification of the Employee as the perpetrator.

In these circumstances, since the employee was engaged in protected activities and did not commit the offense for which he was discharged, it was concluded that the Employer violated Section 8(a)(1) of the Act by discharging the Employee on the basis of strike misconduct committed by another employee.

EMPLOYER REFUSAL TO BARGAIN IN GOOD FAITH

General Counsel to Ask Board to Modify Its Holding in *Central Illinois Construction* that Contract Language, Standing Alone, Is Sufficient to Establish a Section 9(a) Relationship in the Construction Industry

In a significant case decided under the term of former General Counsel Arthur Rosenfeld, the Board was asked to modify its holding in Central Illinois Construction, 335 NLRB 717 (2001), that contract language, standing alone, is sufficient to establish a 9(a) relationship in the construction industry. We also determined that the Board should be asked to reconsider its policy under Casale Industries, 311 NLRB 951, 953 (1993), of treating voluntary 9(a) recognition in the construction industry under the same set of 10(b) rules that apply to employers outside that industry as established in Machinists Local 1424 v. NLRB (Bryan Mfg.), 362 U.S. 411 (1960).

In Central Illinois, the Board held that contract language, standing alone, will be sufficient to establish a 9(a) relationship in the construction industry if the language unequivocally indicates that the union requested recognition as majority or 9(a) representative of the unit employees, the employer recognized the union as the majority or 9(a) representative, and the employer's recognition was based on the union's showing, or offer to show, majority support. 335 NLRB at 719-720.

In our case, the Employer signed a document in May 2003, agreeing to be bound by the collective bargaining agreement and certain side agreements between the Union and a multiemployer association. One of these side agreements included recognition language that clearly met the standards for establishing a 9(a) relationship under the Central Illinois test, including language indicating that

recognition was based on a showing, or an offer to show, majority support.

The Association agreement expired in March 2004, and the Employer provided timely notice to the Union that it would not be bound by any successor agreement between the Union and the Association. When the Union asked the Employer to enter into separate negotiations for a new contract in September 2004, the Employer refused, claiming that the earlier notice also terminated its 8(f) relationship with the Union. A few days later, the Union filed an unfair labor practice charge, alleging that the Employer violated Section 8(a)(1) and (5) when it withdrew recognition from the Union. During the investigation of the charge, the Employer presented evidence that the Union had never told the Employer that it represented a majority of the Employer's employees or that it had authorization cards to substantiate a claim of majority status. Moreover, the Union was unable to produce any probative evidence that it had majority support at the time of recognition.

Under current Board law, the recognition clause in the side agreement was sufficient to establish a Section 9(a) relationship. Central Illinois, supra. Also, under current Board law, the Employer would be time-barred from challenging the Union's majority status at the time of recognition since more than six months had elapsed between the time the Employer expressed its intent to establish a 9(a) relationship and the time the unfair labor practice charge was filed. See Casale Industries, 311 NLRB 951, 953 (1993) (Board refused to allow petitioner to challenge incumbent union's majority status at time of recognition because the challenge was made more than six months after the employer expressed its intent to enter into a 9(a) relationship). Thus, we determined that issuance of complaint was warranted, alleging that the Employer violated Section 8(a)(1) and (5) of the Act when it withdrew recognition from the Union.

However, we further determined that the Board should be asked to modify its holding in Central Illinois. The virtual certainty that the Employer would be able to show that the Union lacked majority support at the time of recognition raised issues of whether the Board's current test best serves the principle of employee free choice and majority rule in the construction industry. We noted that the D.C. Circuit has rejected the Board's determination

that contract language alone can establish a Section 9(a) relationship in the construction industry, at least where "the record contains strong indications that the parties had only a Section 8(f) relationship." Nova Plumbing v. NLRB, 330 F.3d 531, 537 (D.C. Cir. 2003).

Under our proposed modification of the law, contractual language that meets Central Illinois standards would be sufficient to establish a rebuttable presumption of 9(a) status as to the parties to the contract. The employer would be able to rebut that presumption by providing evidence that the union did not actually enjoy majority support at the time of the purported 9(a) recognition. If the employer presents such evidence, the union would then have the burden of presenting sufficient evidence to establish that it did in fact have majority support at that time.

However, under the proposed standard, if the Union's 9(a) status is challenged by unit employees, such contract language would not create any 9(a) presumption since the employees were not parties to the agreement. Rather, in that situation, the party asserting a 9(a) relationship would have the burden of establishing that the union had majority support at the time of recognition.

With regard to the timeliness of the Employer's challenge to the Union's 9(a) status, while there are valid policy reasons for requiring construction employers and employees to challenge purported 9(a) relationships within a reasonable period, we decided that the Board should be asked to reconsider whether, in light of John J. Deklewa and Sons, Inc., 282 NLRB 1375 (1987), enforced 843 F.2d 770 (3rd Cir.), cert. denied, 488 U.S. 889 (1988), the better rule would allow the Board to look behind the 10(b) period to determine what kind of contract was executed. Because of Deklewa, construction employers and employees do not have the same practical incentives to file unfair labor practice charges within six months following a purported 9(a) recognition since doing so ordinarily would have no effect on day-to-day relations under the contract.

There is also no compelling legal basis for a six-month rule for challenging 9(a) recognition in the construction industry. Because 8(f) privileges nonmajority bargaining relations in the construction industry, allowing the Board to examine whether a union had majority support at the time

of recognition does not involve any determination concerning whether the recognition was an unfair labor practice. See Brannan Sand & Gravel, 289 NLRB 977, 982 (1988) (nothing in Supreme Court's construction of Section 10(b) in Bryan Mfg. precludes inquiry into the establishment of construction industry bargaining relationships outside the 10(b) period).

UNION DUTY OF FAIR REPRESENTATION

Union Did Not Violate Its Duty of Fair Representation by Permanently Removing Individual from Referral List in Order to Promote Integrity of its Hiring Hall

Another case involved whether a union violated its duty of fair representation when it permanently removed an employee from its exclusive hiring hall referral list. We decided that the Union's legitimate interest in promoting the efficiency and integrity of its hiring hall privileged the Union to remove the employee for having consciously disregarded a valid hiring hall rule.

The Employer was a trade show industry general services contractor. The Employer and the Union were parties to a collective-bargaining agreement which required the Employer to fill all of its labor needs through the Union's exclusive hiring hall. Although the Employer was permitted to request up to half its needed employees by name, "name-requested" employees were still required to be referred through the hiring hall.

When it filled an employer's labor request, the Union created a job roster of all referents including any name-requested employees. A Union job steward brought a copy of this roster to the work site and used it to sign employees in and out each day. The Union's hiring hall rules also provided:

> Referents obtaining trade show and convention work within the Union's jurisdiction without being referred by the Union or without the permission of the Business Representative will be removed immediately from the list.

The Charging Party employee was a registered hiring hall user who had received a copy of the Union's referral rules.

On November 9, the Employer submitted to the Union a labor request for six employees, including the Charging Party whom the Employer requested by name, for a job to begin on November 11. The Employer mistakenly canceled this labor request on November 10. The Charging Party spoke by telephone with an Employer supervisor who asked why the Charging Party had not reported to work. When the Charging Party explained that the Employer had canceled the request, the supervisor said the Union must have made a mistake, and that the Charging Party should report to the job. According to the Charging Party, the supervisor stated that he would explain the situation to the Union. Although the supervisor did not remember saying this, he admitted that he had erred by telling the Charging Party to report to the job rather than contacting the Union and requesting the Charging Party by name.

The Charging Party signed in to work on the show on November 11, and worked that day and the following two days. Although the Charging Party's name was not on the job roster, the Charging Party signed in on November 11 with the Union job steward without incident. The steward claimed that not until the next day, November 12, did he realize that the Charging Party's name was not on the job roster.

On November 12, the steward received various complaints from co-workers about the Charging Party and told the Charging Party to leave the jobsite. The Charging Party called the supervisor on his way out of the show. The supervisor told him to return because the Employer was behind schedule. The Charging Party did so, working until 4 a.m. on November 13. When the Charging Party arrived to sign in for work at the show later on the morning of November 13, the steward refused to allow him because his name was not on the job roster.

On December 30, the Union gave the Charging Party written notice that it had removed him from the Union's referral list for violating the rule against obtaining work without being referred. The Charging Party filed an appeal of the Union's decision asserting that the supervisor had called him, asked him to come in, and stated that he would "straighten things out" with the Union. Though the Charging Party in his appeal admitted that the steward had asked him to leave, he claimed that the steward told him to

report back the following morning. Finally, the Charging Party stated that after he had left, as the steward had directed, the supervisor asked him to return.

The Union considered the Charging Party's appeal at a hearing in February 2005. The Union noted that the Charging Party had admitted in his appeal that he obtained work on the show by circumventing the Union's referral procedures. The Union thus decided to remove the Charging Party from the referral list.

We decided that the Union's legitimate interest in promoting the integrity of its hiring hall was sufficient to allow it to permanently remove the Charging Party from the hiring hall referral list for having consciously disregarded valid hiring hall rules.

When a union operating an exclusive hiring hall prevents an employee from being hired or causes an employee's discharge, the Board presumes that this action unlawfully encourages union membership because the union has demonstrated its power over the employee's livelihood. See, e.g., Boilermakers Local Lodge No. 40 (Envirotech Corp.), 266 NLRB 432, 433 and cases cited at n.4 (1983). A union may overcome this presumption by showing that its action was necessary to further a legitimate hiring hall purpose. For example, a union may legitimately refuse to refer a hiring hall applicant to prevent the circumvention of its exclusive hiring hall. In Boilermakers Local Lodge No. 40, the Board found that the union lawfully suspended an employee who had applied for work directly with an employer, contrary to the union's written hiring hall rule. The Board expressly approved of the union's decision to strictly enforce its rule against self-referrals as a lawful means of protecting its legitimate interest in ensuring a fair referral system.

Two circuit courts of appeals have held that a union owes a "heightened duty" of fair dealing toward employees in the hiring hall context that requires a union to act with reference to objective criteria. See Jacoby v. NLRB, 233 F.3d 611, 615-617 (D.C. Cir. 2000), reversing and remanding 329 NLRB 688 (1999); Lucas v. NLRB, 333 F.3d 927, 934-935 (9th Cir. 2003), reversing and remanding 332 NLRB 1 (2000). In Jacoby, the union negligently referred several lower-priority hiring hall registrants ahead of the charging party. The District of Columbia Circuit refused

to uphold the Board's finding that the union's departure from its hiring hall criteria constituted neither a breach of its duty of fair representation nor a Section 8(b)(1)(A) and (2) violation. In Lucas, the union expelled an individual from its hiring hall for his purported 15-year record of misconduct, and later denied him readmission without reference to any specific written hiring hall policy. Because the Board's dismissal decision had relied on evidence not in the record, the Ninth Circuit found that its decision, holding that the union had acted in a manner necessary to effectively operate its hiring hall, was unsupported by substantial evidence. Although the Board to date has not adopted the "heightened duty" standard, it has acknowledged the court's rejection of its current standard. See Teamsters Local 631 (Vosburg Equipment, Inc.), 340 NLRB 881, 881 n.4 (2003).

Applying the Board's standard, we decided that the Union treated the Charging Party lawfully. The Charging Party was well aware of the Union's hiring hall rules, which not only prohibit employees from obtaining work directly from employers like the Employer, but also prescribe the penalty for doing so -- removal from the Union's hiring hall referral list. Board law plainly permits the Union to establish and maintain such rules.

We noted that it was undisputed that the Charging Party knowingly violated the Union's prohibition against self-referrals on two occasions, first on November 11 and again on the afternoon of November 12. Even assuming the veracity of the Charging Party's claim, that on November 11 the supervisor told him that the supervisor would explain the situation to the Union later, we would find that the Union lawfully disciplined the Charging Party because he knowingly violated the hiring hall rule.

We also decided that the Union's action satisfied the District of Columbia and Ninth Circuits' "heightened duty" standard. The Union acted pursuant to objective criteria in order to effectively perform its representative function, which plainly encompasses enforcing legitimate hiring hall rules against an individual who knowingly violated them. Unlike in Jacoby where the union departed from its hiring hall rules, or in Lucas where the union acted without reference to any specific written hiring hall rules, the Union here applied its existing hiring hall rules. In this context, there was essentially no

difference between the Board's and the courts' duty of fair representation standards; both require that a union act objectively in furtherance of a legitimate interest. The Union's conduct toward the Charging Party thus satisfied both standards.

UNION REFUSAL TO BARGAIN IN GOOD FAITH

Local Union and its International Unlawfully Failed to Take Agreed-Upon Step of Putting Collective Bargaining Agreement Before Union Membership for Vote

In another case, we found that a local union violated Section 8(b)(3) of the Act by failing to take an agreed-upon contract to its membership for ratification, and that its international shared responsibility with the local for this 8(b)(3) violation because it clearly directed the Local, on pain of strong disciplinary action, to violate its statutory obligations to the Employer. We further concluded that, independently, the International's actions to prevent the Local from taking the contract to ratification violated Section 8(b)(1)(A).

The Local has represented the Employer's employees for about 100 years. Because the Local was eager to get funds to replenish its pension and healthcare funds and the Employer was willing to pay a substantial sum in exchange for a waiver of the Local's right to engage in sympathy strikes, the parties reached a full tentative agreement satisfying the interests of both parties. The only condition precedent to final agreement was ratification by the members, and the Local agreed to recommend the agreement to employees for ratification.

When the International learned that the parties' agreement pending ratification contained a comprehensive no-strike provision that, in its view, was harmful to its interests and those of its membership, it informed the parties that it would (1) not allow the Local to enter into an agreement with the no-strike clause, (2) invoke the International's constitution to prevent a ratification vote, (3) put the Local into trusteeship and replace its leadership if the Local went ahead with the ratification vote. Relying on a constitutional provision, the International also directed the Local to cancel the scheduled ratification vote and refrain from taking the

agreement to ratification. As a result, the Local informed the Employer that it had cancelled the ratification vote based on the directive from the International.

We concluded that since ratification was the sole condition precedent to a binding agreement, the Local was obligated to promptly submit the agreement to the employees for approval or rejection, even though compliance with its statutory obligation might lead to harsh discipline from the International. Once parties enter into a tentative agreement conditioned only on ratification, the party controlling the ratification has a good-faith duty to promptly hold the ratification vote as promised. Delaying the ratification process violates the duty to bargain in good faith. See Long Island Day Care, 303 NLRB 112, 129 (1991); Steelworkers Local 7807 (ITT Abrasive Products), 224 NLRB 78 (1976). The Local was not entitled to delay ratification and obstruct final agreement in the pursuit of other results. As in Steelworkers, where the union delayed ratification to obtain information from the employer regarding discipline for strike misconduct, the Local cannot delay ratification to avoid the punishment the International has threatened in return for the broad no-strike clause. The Local's dispute with the International is not a legitimate basis for failing to schedule the ratification vote, but, as in Steelworkers, is a separate dispute that cannot obstruct its Section 8(d) obligation to bargain in good faith.

We further concluded that the International shared Section 8(b)(3) liability for the Local's illegal actions in failing to submit the contract to ratification, even though the International is not the 9(a) representative of the employees, because the International initiated, directed and controlled the Local’s actions. Sheet Metal Workers Int’l. Assn., 127 NLRB 1629, 1630, 1666-1667 (1960) (international liable for local’s unlawful inducement of secondary’s employees not to handle nonunion products where "do not handle" policy was embodied in international constitution and policies and local was acting pursuant to directions from international). Finally, we concluded that, independently, the International's actions to force the Local to commit an unfair labor practice by failing to take the contract to ratification also violated Section 8(b)(1)(A). We noted that the International may be privileged to discipline the Local for agreeing to the provisions here, which the International believes are

against its interests. It could not, however, use the threat of trusteeship or other discipline to preclude the Local from performing its statutory obligation to take the agreed-upon contract to ratification -- thereby frustrating several overriding labor law policies. See, e.g., Local 1367, ILA (Galveston Maritime Association), 148 NLRB 897, 898 (1964) (district union violated Section 8(b)(1)(A) by initiating action pursuant to its constitution to impose trusteeship on its constituent local in retaliation for the local's having filed unfair labor practice charges against it).

As to the appropriate remedy, in addition to cease and desist provisions, we concluded that the Local, under either current or new leadership, should be required to promptly submit the bargaining agreement to the membership for a ratification vote with a recommendation in favor of the agreement, and, if ratified, execute that agreement. The International should be required, among other things, to cease and desist from demanding that the Local not submit the agreement to its membership for a ratification vote and from threatening the Local with trusteeship and replacement of its officers if the Local's representatives submit the agreement to the membership for a ratification vote. As to affirmative provisions, we concluded that the International should be required to rescind its letter to the Local directing it not to hold any ratification vote on the proposed agreement.

SECONDARY BOYCOTTS

Union’s Display of Inflated Rat near Construction Site Constituted Unlawful Inducement to Neutral Employees to Withhold Services

In this case, we considered whether a union violated Section 8(b)(4)(i) and/or (ii)(B) by displaying an inflated rat near a construction site. We concluded that the display of the rat, in combination with other activity, was designed to induce employees to withhold services from a neutral employer in violation of Section 8(b)(4)(i)(B). We further concluded that the conduct did not violate Section 8(b)(4)(ii)(B), however, since the evidence failed to demonstrate the activity was aimed at convincing consumers to boycott the neutral employer.

The neutral was a general contractor involved in constructing a large, multi-story condominium building on a busy street located downtown in a major city. The condominium sales office was located on an upper floor of the building next door. The primary was a construction contractor performing work for the general contractor on the condominium construction site.

Shortly after the primary began working on the construction site, four Union agents arrived in front of the sales office building next door to the construction site. They wore bright orange vests identifying themselves with the Union and urging a boycott of the neutral. They passed out handbills urging a boycott of the neutral, explaining that it subcontracted work to the primary employer with whom the Union was engaged in a labor dispute. The sidewalk in front of the building, located directly adjacent to the construction site, was the closest the Union agents could get to the worksite without standing in the middle of traffic in this busy, downtown street. The men were stationary, did not patrol, and did not speak with consumers or employees. The Union agents also parked a truck near the curb in front of the sales center with an inflated rat in the truck bed, facing the sidewalk. A sign urging a boycott of the neutral was draped underneath the rat. On each of the several days that this activity occurred, the men were present until around 3:00 p.m., which is when employees at the construction site quit work.

Since the Union did not engage in traditional picketing, we considered whether the Union's use of the rat was picketing within the meaning of Section 8(b)(4). The General Counsel had previously argued that a union’s use of a large inflated rat, which is a well-known symbol of a labor dispute, could constitute conduct tantamount to picketing intended to induce employees to withhold services or persuade third persons not to do business with these establishments. In Laborers' Eastern Region Organizing Fund and the Ranches at Mt. Sinai, 346 NLRB No. 105 (April 28, 2006), the ALJ agreed that the display of a rat was the "functional equivalent of picketing" and violated Section 8(b)(4)(i). The ALJ explained that the rat "sent a signal to those who approached the entrance that a labor dispute was occurring and that action on their part was desired." (346 NLRB No. 105, JD slip op. at 22). In that case, the Board did not pass on the ALJ's conclusion regarding the

inflated rat because it found that the respondent union's patrolling was sufficient to constitute picketing. Id., slip op. at 3.

In this case, we concluded that the Union's conduct in front of the building next to the worksite was signal picketing intended to induce employees of the neutral and other neutral employers to withhold their services. We first determined that the Union's use of a large inflated rat, combined with the large sign hanging from the truck and the message displayed on the Union representatives' vests, constituted signal picketing. We relied on the fact that a rat is a well-known symbol of a labor dispute and can be a signal to third persons that there is an invisible picket line they should not cross. The large sign hanging from the truck and the message on the vests served to amplify and reinforce that message. We then determined that, in these circumstances, the picketing was aimed as a signal to induce employees to stop work. This was evident from the placement of the pickets right next door to the construction site – the Union's closest proximity to the worksite without standing in the middle of traffic on a busy, downtown street – combined with the fact that the picketers were present only when employees were working at the construction site.

However, based on the particular facts of this case, we concluded that the Union's conduct did not violate Section 8(b)(4)(ii)(B). We determined that the picketing was not aimed at convincing consumers to boycott the neutral general contractor, as the message on the leaflets would suggest. The passing public would have no business whatsoever with the neutral at this location, and therefore the Union could not have intended to prevent them from crossing an "invisible" picket line. Instead, we concluded that the handbills were a sham intended to mask the true intent of the activity, which was to induce employees to stop their work on behalf of the neutral and other neutral employers at the jobsite. Thus, this case did not implicate our decision to hold in abeyance similar cases involving banners and inflated rats that appeal to customers.

Union Grievances Attacking Transfer of Union-Represented Store to Non-Union Subsidiary Do Not, at this Time, Seek Unlawful Secondary Object

In one Section 8(e) and 8(b)(4) case, we addressed whether it was unlawful for several local unions to pursue contractual grievances against an employer that transferred two retail grocery stores to a wholly owned non-union subsidiary. We concluded that it was appropriate to hold the case in abeyance pending the outcome of arbitration because the unions' grievances did not, at that time, seek an unlawful contract interpretation.

The Employer, a retail grocery chain, was party to a multiemployer, multiunion collective-bargaining agreement. One provision of the agreement provided that the Employer must recognize the union as the exclusive bargaining representative of "all employees ... who perform work within food markets ... presently operated and hereafter established, owned or operated" by the employer within the local union's jurisdiction. Another article prohibited all subcontracting of bargaining unit work. The Employer acquired another grocery chain, which continued, as a wholly-owned subsidiary, to operate as a separate chain under different management. The newly-acquired chain later agreed to purchase two existing Employer stores covered by the collective-bargaining agreement, and reopened them as its stores and hired its own complement of employees.

The Unions filed a grievance over the store closure and the replacement with a store operated by the subsidiary chain. The grievance contained two alternative theories: that the Employer violated the contract's definition of the bargaining unit by transferring the store because the store was "owned and operated by" the Employer; and that the Employer violated the contract's "no subcontracting" clause because the transfer was "in essence subcontracting all of the bargaining unit work." The Employer alleged that the grievance based on the unit description violated Section 8(b)(4) and 8(e) because it was premised on an interpretation of the contract that violated 8(e); specifically, that the Unions were unlawfully asserting that the Employer and the subsidiary chain were the same employer. The Employer asserted that the grievance had an unlawful object of forcing the subsidiary chain – a separate neutral employer – to recognize the Unions and apply the contract to its employees. The Employer stated

that it was not alleging that the no-subcontracting clause grievance theory violated the Act, because it was confident that it would prevail before the arbitrator on that theory.

The Unions asserted that the "unit description" grievance theory was dependent on a single employer finding and argued that subpoenas issued in the arbitration proceeding might adduce additional evidence on that point. They also asserted that the "no subcontracting" theory was lawful because it had a work preservation object. The Unions contended that they did not seek to apply the contract to the subsidiary chain's employees, but rather were demanding that the Employer rescind its agreements to sell the stores and reinstate and make whole unit employees.

We concluded that a Section 8(e) or 8(b)(4) complaint was not warranted pending completion of arbitration, as the "unit description" grievance theory was premised on the legal theory that the Employer and the subsidiary chain were a single employer, and thus did not have an unlawful secondary object provided the Unions did not depart from that position before the arbitrator. We further concluded that the "no subcontracting" grievance had a work-preservation object and was not secondary in nature.

The Board has found that a union violates Section 8(b)(4) by pursuing a grievance seeking an unlawful 8(e) interpretation of a contract clause. Elevator Constructors (Long Elevator), 289 NLRB 1095, 1095 & n.2 (1988), enfd. 902 F.2d 1297 (8th Cir. 1990). Section 8(e) prohibits only those agreements with a secondary purpose, i.e., agreements directed at a neutral employer or entered into for their effect on another employer. While companies that are bound only by common ownership generally are found to be neutrals with respect to each other's labor relations, ostensibly separate entities that would constitute a "single employer" under the Act are not considered neutrals. Sheet Metal Workers Local 91 (Schebler Co.), 294 NLRB 766, 771 (1989), enfd. in part 905 F.2d 417 (D.C. Cir 1990).

We concluded that the first grievance theory, viz. that the transfer violated the contract's "unit description" because the stores remain "owned and operated by" the Employer, was not unlawful. The Unions conceded that the theory would not succeed unless they adduced additional evidence at the arbitration demonstrating single

employer status. Moreover, a union does not commit an unfair labor practice by filing a grievance or attempting to enforce an arbitral award unless the grievance has an unlawful object or lacks a reasonable basis in fact or law. For example, in Teamsters Local 483 (Ida Cal), 289 NLRB 924, 925 (1988), the Board found that a union did not violate Section 8(b)(4)(ii)(A) by filing a Section 301 lawsuit claiming that certain owner-operators were covered by a collective-bargaining agreement, even though the Board ultimately decided the owner-operators were independent contractors. See also Hotel & Restaurant Employees Local 274 (Warwick Caterers), 282 NLRB 939, 940-41 (1987)(no 8(b)(1)(A) violation when a union sought to use a grievance to apply a contract to employees the Board ultimately found the union did not represent). Given the fact-specific nature of the single employer analysis, including one element – common ownership - not in doubt, we could not say that the unions lacked a reasonable basis for alleging that commonly owned entities were a single employer.

We also concluded that the "no subcontracting" grievance theory did not unlawfully interpret that clause to be a de facto hot cargo provision. It is well settled that contract clauses that prohibit subcontracting entirely, or require subcontractors to employ unit employees, have a primary work preservation object and are lawful. See, e.g., Service & Maintenance Employees' Union Local 399 (Superior Souvenir Book Co.), 148 NLRB 1033, 1034-35, 1047 (1964). Even if the transaction between the Employer and the subsidiary chain could more accurately be characterized as a sale or transfer of stores rather than as "subcontracting," that was a question the arbitrator would resolve in deciding the merits of the grievance.

REMEDIES

General Counsel to Urge Board to Apply Traditional Remedy of Rescission of Discipline Flowing from Unilaterally Implemented Surveillance Cameras, with the Exception of Reinstatement of Employees Caught Using Drugs at Work

In response to a remand from the Court of Appeals for the District of Columbia, the General Counsel directed the Region to file a brief with the Board to argue a two-fold rescission remedy for discipline that stemmed from the Employer's unlawful, unilateral installation of surveillance cameras in the workplace. In response to concerns that an elevator motor room on the roof of one of its buildings was being used for activities inconsistent with work assignments, and possibly for drug use, the Employer unilaterally installed hidden video cameras to monitor that room and the rooftop stairs leading to it. As a result of images captured by these cameras, the Employer discharged five employees for smoking marijuana and gave lesser discipline to eleven other employees, either for leaving their assigned work areas for extended periods, sleeping on the job, or urinating on the roof.

The Board, in agreement with the administrative law judge, concluded that the use of hidden surveillance cameras in work and break areas constitutes a mandatory subject of bargaining, and that the Employer violated Section 8(a)(1) and (5) by installing and using such cameras in work and break areas without notifying and bargaining with the Union. The Board also unanimously found that the Employer unlawfully refused to timely respond to the Union's request for information regarding the use of surveillance cameras. Anheuser-Busch, Inc., 342 NLRB No. 49 (2004).

To remedy its unilateral installation of the hidden surveillance cameras, the Board required the Employer to bargain about the installation of such cameras, but a majority of the panel declined to require the Employer to rescind the discipline imposed on the 16 employees for misconduct that the Employer discovered through its use of hidden surveillance, or to offer reinstatement and pay backpay. The Board agreed with the administrative law judge's conclusion that it would be "inconsistent with the

policies of the Act, and with public policy generally, to reward employees who engaged in unprotected conduct." Id., slip op. at 2. The Board likened this case to Taracorp, Inc., 273 NLRB 221 (1984), where the employer committed a Weingarten violation, but the Board denied reinstatement to discharged employees because the discharges were for cause and were unrelated to the violation of not permitting a union representative's presence at a disciplinary meeting.

The D.C. Circuit unanimously affirmed the Board's findings that the Employer violated Section 8(a)(1) and (5) of the Act by installing and using hidden surveillance cameras without first bargaining with the Union, and by failing to timely provide relevant information concerning hidden surveillance. Brewers and Maltsters, Local Union No. 6 v. NLRB, 414 F.3d 36, 45-46 (D.C. Cir. 2005). However, the panel majority remanded the case for the Board to address the appropriate remedial order for the 16 disciplined employees. The Court concluded that this case was indistinguishable from Tocco, Inc., 323 NLRB 480 (1997), in which the Board ordered an employer to reinstate employees discharged for testing positive on drug tests, where the drug use was discovered only as a result of an unlawful change in the testing policy. 414 F.3d at 47-49.

The General Counsel directed the Region to argue in its brief to the Board on remand that it was appropriate to deny reinstatement to employees discharged for using drugs while at work – acts that constitute serious criminal misconduct at the workplace that likely impaired the employees' ability to perform their jobs in a safe and efficient manner. This is consistent with the Board's approach when reviewing conduct so egregious as to render employees unfit for reinstatement. See, e.g. Alto-Shaam, Inc., 307 NLRB 14 (1992), enfd. 996 F.2d 1219 (7th Cir. 1993) (denying reinstatement to unlawfully discharged striker who had threatened fellow employee); see also Precision Window Mfg., Inc. v. NLRB, 963 F.2d 1105 (8th Cir. 1992) (denying reinstatement to employee who had threatened to kill his supervisor). These individuals are properly considered "unfit" for reinstatement, and to require the Employer to reinstate them would condone this behavior and improperly reward serious criminal misconduct.

However, with regard to the employees disciplined for lesser offenses such as extending their breaks, sleeping, and urinating on the roof, the General Counsel directed the Region to argue that the usual Board remedy requiring

rescission of the discipline that sprung from the Employer's unilateral change is appropriate, absent any countervailing considerations that would render the usual remedy inappropriate in these cases. The Employer would not have known of the employees' infractions but for its use of hidden surveillance. Under these circumstances, the discipline is a direct result of the Employer's unlawful unilateral installation and use of hidden surveillance cameras, and rescission of the discipline would not conflict with any statute or public policy. In these kinds of circumstances, employees are entitled to rescission of any discipline and, where appropriate, reinstatement and backpay. This will restore the status quo and is the most appropriate way to effectively remedy the unfair labor practice. See, Tocco, Inc., supra; Great Western Produce, 299 NLRB 1004, 1006 (1990).

SECTION 10(j) AUTHORIZATIONS

During the three month period from January 1 through March 31, 2006, the Board authorized a total of nine Section 10(j) proceedings. Most of the cases fell within factual patterns set forth in General Counsel Memoranda 06-02, 01-03, 98-10, 89-4, 84-7, and 79-77.[1] Two cases were somewhat unusual and therefore warrant special discussion.

The first case involved an employer's refusal to recognize and bargain with an international union with which an independent union had affiliated. The Union was certified as the collective-bargaining representative for the Employer's approximately 2,400 employees at its chicken processing plant. The parties met for approximately 13 negotiating sessions, but failed to agree on a collective-bargaining agreement. After distributing flyers and conducting meetings about affiliating with a larger and more established union, the employees voted by secret ballot to affiliate with the IAM. The affiliation agreement provided that the Union would become an independent local lodge of the IAM and would retain its old officers.

The Union notified the Employer of the affiliation and requested the resumption of labor negotiations and a

[1] See also NLRB Section 10(j) Manual (September 2002), Section 2.1, "Categories of Section 10(j) Cases."

current list of names and home addresses for the bargaining unit employees. The Employer refused to bargain or provide the information, asserting that the affiliation was not legally proper. The Region concluded that the Union's affiliation was conducted with adequate due process and that the affiliation did not result in changes that were sufficiently dramatic to alter the identity of the Union. Thus, the Employer's withdrawal of recognition from the affiliated Union and its refusal to provide the information violated Section 8(a)(5).

The Board concluded that Section 10(j) relief was necessary in this case to prevent irreparable erosion of the Union's employee support, to preserve the newly affiliated Union's representational status in the unit, and to prevent the loss of the benefits of Union representation pending the Board's final decision. The District Court granted an injunction in this case.

The second case involved a protective restraining order during an on-going administrative proceeding. An ALJD had issued in the case, finding that the Employer, its nonunion alter egos, and individual family members involved in these family businesses were liable for violations of Section 8(a)(1), (3), and (5), including refusal to recognize the Union, failure to make contributions to the Union's welfare and other funds, and an unlawful employee discharge. The ALJ found the family members personally liable based on evidence that they had engaged in a pattern of siphoning corporate funds for personal use, commingling personal and corporate accounts, and structuring their personal assets in such a way as to evade legal obligations. Further, while the hearing was underway, one of the individuals sold real property and quickly dissipated over $70,000 in proceeds without providing any documentation as to where the proceeds went.

The Board concluded that there was a likelihood that some of the named Respondents would engage in further asset dissipation to evade their labor obligations and that Section 10(j) protective order proceedings, including a temporary restraining order, were warranted to sequester the funds necessary to satisfy a potential Board monetary award and to prevent further dissipation of assets pending a final Board award. The District Court granted a temporary restraining order in this case. The Board's request for a temporary injunction became moot upon the

issuance of the Board's final decision and order in the underlying administrative proceeding. The Respondent is refusing to comply with the Board order and further relief is being considered under Section 10(e) of the Act.

The nine cases authorized by the Board fell within the following categories as described in General Counsel Memoranda 06-02, 01-03, 98-10, 89-4, 84-7 and 79-77:

Category	Number of Cases In Category	Results
1. Interference with organizational campaign (no majority)	2	One case settled before petition; one case became moot by Board decision.
2. Interference with organizational campaign (majority)	1	Case is pending.
3. Subcontracting or other change to avoid bargaining obligation	0	- - -
4. Withdrawal of recognition from incumbent	2	Won one case; one case is pending.
5. Undermining of bargaining representative	0	- - -
6. Minority union recognition	0	- - -
7. Successor refusal to recognize and bargain	3	Won two cases; one case became moot by Board decision.
8. Conduct during bargaining negotiations	0	- - -

9. Mass picketing and violence	0	- - -
10. Notice requirements for strikes and picketing (8(d) and 8(g))	0	- - -
11. Refusal to permit protected activity on property	0	- - -
12. Union coercion to achieve unlawful object	0	- - -
13. Interference with access to Board processes	0	- - -
14. Segregating assets	1	Case mooted by Board decision.
15. Miscellaneous	0	- - -